

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

APR. 23 1913

Henry C. Hodges.
Bliss

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1913.

No. 2533.

8

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

JAMES M. WOOD.

BRIEF FOR APPELLANT.

EDWARD H. THOMAS,

Corporation Counsel;

FRANCIS H. STEPHENS, *Assistant,*

Attorneys for Appellant.



IN THE
Court of Appeals, District of Columbia.

APRIL TERM, 1913.

No. 2533.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

JAMES M. WOOD.

Statement of the Case.

This case comes up on a bill of exceptions. Plaintiff below, James M. Wood, was an inspector in the service of the District of Columbia and, at the time of the accident, was detailed as an inspector in the alley-cleaning service. His duty was to follow the contractor's gangs and see that the alleys were properly cleaned and the dirt properly piled and removed. The accident to Wood happened on the 16th of March, 1908. On this day he was following a gang of men employed by Stutler and Reading (Ready), District contractors, who had just cleaned the alley between 14th and 15th and I and K streets northwest. He inspected this work. He went into the east wing of this alley, going east, and

passed over the doors of the manure pit attached to the stable of the Mexican embassy. He says he was compelled to pass over these doors because the alley was blockaded and that was the only way he could get in. He could not walk close to the wall of the stable, but passed over the doors about a foot and a half or two feet from the walls. It was his duty to see that this alley was swept as measured in the schedule given him, that is, from building line to building line, which was what the contractor was paid for sweeping and it included these cellar doors. That the doors of this manure pit were usually closed and were closed at the time of the accident, and when closed looked to be all right. He saw nothing wrong with the doors when he went into the alley going east and he did not know the hinge was broken and there was nothing to indicate it. After he had finished his inspection of the alley, *which necessarily included these doors*, he turned westward, to go out of the alley, and going out stepped upon the west door of the pit which tilted with him and let him part way down into the empty pit. One leg went down and his hip caught on the crossbar where the doors came together. Some men helped him up and helped him to the corner of the stable where he leaned against the wall for three or four minutes and then got into a buggy and went home. He was absent from work about a month, but did not lose any pay. The doors of the pit were of iron, one-fourths to three-eighths of an inch thick and weighed each about two hundred and fifty pounds. They were three feet wide and two and one-half feet long each, and the pit was about three feet wide and five feet long. The doors rested on a cross-beam in the middle two and one-half inches wide and upon three sides upon the stone coping an inch or an inch and a half above the surface of the alley. Neither door had any support along the stable wall. One door had a "bite" of one-half an inch on the stable end and two inches on the other end. The doors were hinged with heavy strap hinges to the doors and a hinge was broken off each door on the

side away from the stable; a pin was broken on one hinge on the south side of the west door. The pit was six or seven feet deep and the hinges had been observed to be in a broken condition three or four months before the accident (Record, p. 6). Mr. Wood did not report to the Street Cleaning Department obstructions that were found in the alleys, and says he had no instructions to do so except when they were barricaded (Record, p. 6). But the letters sent by him (Record, pp. 7 and 8) show that he did report various obstructions, and support the contentions of the District that it was part of Wood's duties, as inspector, to report all obstructions and dangerous conditions that might come under his notice (Record, p. 8).

Assignment of Errors.

Plaintiff in error assigns for error:

1. The refusal of the court to direct a verdict for the defendant.
2. The charge of the court that the measure of care required of the municipality was the same that an individual would exercise if he had control of the streets.
3. The part of the charge of the court that the plaintiff could not recover if he went into the alley charged with a duty which included the actual inspection of the cellar doors.
4. The refusal of the court to charge the jury that the defendant was not liable unless it had actual notice of the defect in the cellar doors, as asked in defendant's second prayer.
5. The refusal of the court to rule that the defendant would not be liable on the ground of constructive notice unless the defect in the cellar doors was apparent to an observer

exercising ordinary care and had existed for such length of time that the defendant should have known of the defect and repaired it, as asked in defendant's third, fourth, and fifth prayers.

6. The refusal of the court to charge the jury that if the defect in the cellar door could have been discovered by the use of ordinary care, the plaintiff was guilty of contributory negligence, as asked in the defendant's sixth prayer.

7. In entering judgment for the plaintiff.

ARGUMENT.

(a.) The defect causing the injury was a latent defect not apparent on ordinary observation and the District is not liable unless it had express notice. There is no evidence in the case tending to prove that the District had express notice and therefore the court should have directed a verdict (assignments of error, 1, 4, and 5).

"SEC. 807. *Notice in Case of Latent Defects.*—As indicated in the last preceding section, the nature, character and situation or location of the obstruction or defect may have an important bearing upon the question of notice. A shorter period of time might well be deemed sufficient to charge the municipality with constructive notice of a plainly visible and notorious obstruction or defect in the principal part of the main street of a large city, for instance, than would ordinarily be required if the defect were in an out-of-the-way place, not easily seen, and comparatively slight. So, there are undoubtedly latent defects as to which the municipality would not be chargeable with constructive notice at all, and such indeed, is the general rule, where they are strictly latent so as not to be discoverable by the exercise of ordinary or reasonable care. It is, however, chargeable with knowledge or notice of what might in some sense be called latent defects, where it could and would have

discovered them if it had exercised ordinary and reasonable care. Thus, there are cases in which there has been held to be a liability where an inspection should have been made, by which the defect could have been discovered. So, as will be shown in the next section, there are certain matters, such as the natural and ordinary effects of the elements, of which it may be required to take notice; and knowledge of the existence of a cause naturally calculated to produce such a defect may make the municipality chargeable with notice of the defect."

Vol. 2, Elliott on Streets and Roads, pp. 222, 223, §807.

"If the defect be palpable, dangerous, and has existed for a long time, the jury may very properly infer either negligent supervision and ignorance consequent upon and chargeable to such neglect, or notice of the defect and a disregard of the duty to repair it."

Vol. IV, Dillon on Municipal Corporations, sec. 1720, p. 3021, note.

See also 61 L. R. A., 586, "6. When defect not apparent."

Where an excavation underneath the sidewalk was made by the owner of adjoining premises and used by the occupant thereof for receiving coal and wood through four coal holes in the sidewalk, and the plaintiff was injured by stepping upon the cover of one of such holes, and the evidence of the plaintiff showed that the flange on which the cover rested was defective and that it had repeatedly tilted or tipped up by simply being stepped on, and the jury found that the coal hole and cover in their existing condition were defects in the sidewalk and that the cover was liable to be tipped when stepped upon; that the defendant city had no actual notice of the defect, but that it had existed so long and so notoriously that the city would, in the exercise of proper care on the part of its agents and officers, have known of it, such finding will not be sustained, as the defect in the sidewalk was a secret one, not apparent to ordinary observation, and

the nature and character of the defect, notice of which would be imputed to the city within the proper rule, was not pointed out as it should have been by the trial judge. It is not the duty of a municipality to examine covers to coal-hole openings, such as the one in question, to ascertain if they are unfastened, unless there is something apparent on the surface or otherwise brought to its attention, to lead its proper officers to believe that the same are loose and likely to become displaced (*Cooper vs. Milwaukee*, 97 Wis., 458, 468, 469).

Coal hole under the sidewalk, closed with tight-fitting cover, presenting a smooth appearance on top, and designed to be fastened on the inside, and, because not fastened, it turned when stepped upon by plaintiff, and he fell, his right leg going down into the opening, and was injured. City was held *not* liable. The court said: "We think if the coal hole was properly constructed and the cover was properly fitted and was not apparently insecure, and the only defect, if any, was that it was left unfastened on the inside by the occupant of the cellar, and this was not known to the officers of the city or apparent from the street, that the jury could not properly find, under existing statutes, that the city could have remedied the defect or prevented the injury by reasonable care and diligence." The statute referred to is that if defect had not existed for twenty-four hours city must be shown to have had reasonable notice (*Hanscom vs. Boston*, 141 Mass., 242, 247).

Denver vs. Dean, 10 Colo., 375: Knowledge to give constructive notice to city means knowledge of visible defects or obstructions or defects that are natural or legitimate results of use and climatic influences. An instruction that knowledge gained by chief of police in pursuance of his duties may have been sufficient to charge city is erroneous.

Instructions to the jury are defective which do not require them to find that the plaintiff could not have avoided the injury by exercise of due care and caution (*Owings vs. Jones*, 9 Md., 108, 118).

Carvin vs. City of St. Louis et al., 151 Mo., 334; Plaintiff was injured by falling through a water-meter box situated in a sidewalk, and in her petition alleged that the meter cover was entirely without fastenings and was loose and was liable to become displaced and removed and the opening to be exposed; that dirt and debris had accumulated in the flanges and grooves, and under the cover, so that said cover was liable to slip and give way under the weight of plaintiff in walking across it. The evidence showed that the injury was occasioned by plaintiff stepping with her right foot upon the cover to one side, thereby letting his foot drop down into the hole. *Held*, that the defect was a hidden or latent one, and not open and notorious (p. 345).

Burns vs. City of Bradford, 137 Pa., 361: Where there is no structural defect in a sidewalk the municipal corporation is not liable for injury occurring by reason of its unsafe condition unless it had express notice of its defective condition, or the same was so notorious as to be evident to all persons passing.

If the defective condition be such that it is discovered by one out of very many persons who pass by it, in the ordinary pursuit of business or pleasure, it cannot be said to be notorious or to be such a defect as that municipality is chargeable with constructive notice of its existence.

Plaintiff, injured by falling on plank sidewalk, testified that one side of it was lifted up, at the time of her fall, so as to be a foot higher than the other. One witness in her behalf testified that she saw it two or three weeks before, and that it was then in the same condition. No other witness testified that the walk was out of order prior to the accident. Plaintiff had passed over it just before and had seen nothing wrong with it. A witness in her behalf, who came to her assistance when injured, testified that there was nothing to call his attention to it as dangerous. There was no evidence of structural defect, and the evidence was held insufficient to charge the city with constructive notice. As there was no

evidence of actual notice it was error to submit question of liability to jury.

Poole vs. Jackson, 93 Tenn., 62: Following charge held correct: "The defendant (city) is not an insurer against accidents upon its streets and sidewalks, but is bound to keep them in a reasonably safe condition, but not absolutely so. Its duty is only to see that sidewalks and streets are reasonably safe for persons traveling on them while exercising ordinary care and caution. It is only bound to use ordinary care and attention to keep its streets and sidewalks in a reasonably safe condition for persons traveling in the ordinary modes, by night as well as by day, while exercising reasonable care and caution" (p. 68).

Also "By constructive notice is meant that, if there was a defect in the sidewalk, and the defect was so patent and obvious as to be generally noticed by persons passing over it, and this continued to exist for such a length of time prior to the time of the alleged accident that it might be reasonably inferred that some member of the board of mayor and alderman, or employee of defendant whose duty it was to keep the streets in repair, had notice of such defects" (pp. 68-69).

Wakeham vs. St. Clair Township, 91 Mich., 15, holds township not liable for latent defect in highway. If horse broke through what appeared to be solid earth, and nothing upon surface to give notice or knowledge that hole was being eaten away underneath by water, defendant not chargeable with negligence.

Hamburg and Grand Rapids, 99 Mich., 292: When the evidence tended to show that stringers of a sidewalk were decayed, but the planking in good condition, and just before the injury a horse had been tied to a plank, and as plaintiff came along the horse jerked the plank out and plaintiff stepped into an aperture and fell, it is error to instruct that the municipality is liable whether the defective condition is due to wear and decay, or misconduct of individuals; the

obligation to repair speedily is the same, there being no evidence of actual notice to municipality and no pretence that reasonable time to repair had elapsed, or sufficient time to operate as constructive notice, and in any event the use of the word "*speedily*" was improper and calculated to mislead the jury.

In absence of actual notice, municipalities are only liable for such defects in the sidewalk as are apparent, or are suggested by appearances, or which are disclosed by a test in the ordinary use of such walks (pp. 294, 295).

Baustian vs. City of St. Louis, 152 Mo., 317: When plaintiff's testimony shows that his injury was due to a hollow beneath the sidewalk, caused by the ground being washed out, and nothing is shown as to when that occurred, the defect is not so obvious as to impute notice (p. 326). There was no actual notice to the city. Plaintiff was walking on a plank sidewalk which gave way and injured him. Sleepers were rotten and nails hanging down, but it would not have given away but for the hollow in the ground under it.

Duncan vs. Philadelphia, 173 Pa. St., 551: In an action against a municipality to recover damages for personal injuries suffered by plaintiff's falling into a coal hole in a sidewalk, the evidence tended to show that the under side of the iron grate which covered the coal hole had become so worn at the edge where it rested on a stone ledge that it slipped out of place when the plaintiff stepped on it. The edge had also become worn, thereby increasing the danger of the displacement of the grate. These defects were not apparent, and could not have been seen by any one on the pavement. The grate projected half an inch above the surface of the pavement, and on two or three occasions had been displaced by passers-by who struck it with their feet, but no one had been injured. The defendant requested the court to charge that in the absence of actual or implied notice of the condition of the hole, the city was not bound to examine it in order to ascertain its condition, and that notice of the defective con-

dition could not be implied if the defect could not be seen without removing the cover and making an examination, and that in the absence of notice the city was not bound to do this. *Held*, that such instruction should have been given.

A municipality not obliged to seek for defects, but to be vigilant to observe them when they become observable to an officer exercising a reasonable supervision (Sup., 554).

Cooke vs. City of Anamoose, 66 Iowa, 427; (Syl. 1, p. 428): A city is not charged with notice of a defect in a sidewalk which is not apparent to the ordinary observer, and whose existence is not known to the inhabitants of the city generally (Syl. 3, p. 430).

Plaintiff was injured by being struck by a loose plank thrown up by the weight of a person walking with one who stepped on the part of the plank which was outside the sill. The plank had been loose for two weeks before the accident and noticed by a number of persons.

Ordinarily it lay in its proper position, but once was taken out of walk and thrown into street, where it remained for a few hours, when it was put back in its place in walk (p. 428).

A person walking in middle would not be apt to notice defect. Number of witnesses testified that they had passed over walk frequently during the time the plank was loose, and that their attention was not called to its condition.

The jury was instructed that plaintiff was not entitled to recover. On appeal the court said the defect was not *apparent to an ordinary observer, but required close investigation* to discover that the plank was loose. Instruction of trial court for defendant city sustained (p. 430).

Dewey vs. Detroit, 15 Mich., 306: The city is liable if it has notice. Notice may be presumed, or inferred, "if the defect was open and notorious, or of long standing, and of such a character as would naturally arrest the attention of persons passing it" (p. 311).

"That in the absence of proof of express notice to the defendant of the defect which was the alleged

cause of the injuries received by the plaintiff, the plaintiff cannot recover unless the jury finds that such defect was so open and palpable as to be apparent, and necessarily attract the attention of passers-by" (p. 311).

Plaintiff was injured by his foot catching under a board (in the sidewalk) which was raised by a person stepping upon the end of it (p. 311).

Lohr vs. Philipsbury, 165 Pa. St., 109:

"The plaintiff and all her witnesses who testified to the appearance of the walk before the accident agree that it was near the ground and level, that the boards were in place and apparently sound, and that in walking over it there was no noticeable defect in it" (p. 112).

"When this case was here before * * * we decided * * * that it 'was holding the borough to too strict a rule of responsibility' to require that its officers should make an examination of the sidewalk by going upon it to discover, if by the eye they could do so, whether it was defective or not. We then distinctly held that the borough was not obliged to seek for defects, and that the measure of its duty was to such as a reasonable supervision disclosed" (p. 112).

The defendant's witnesses testified "that there was nothing in the appearance of it that it was unsafe or in any way defective. The plaintiff offered no evidence to show that the borough had actual notice that it was out of repair," etc.

Jones vs. City of Sioux Falls, 18 S. D., 477, was a case of a hole in a sidewalk where a plank had been broken off at the end and then forced downward, at a place repaired three months before (Syl.).

No claim was made that the city had actual notice, and the undisputed evidence tends to show that the defect was not discoverable from mere observation (p. 483).

"In the absence of actual notice, municipalities are only liable for such defects as are apparent, or are

suggested by appearances, or which are suggested by a test in the nature of the ordinary use of such sidewalks" (p. 484).

Citing *Hembling vs. Grand Rapids*, 99 Mich., 292.

When "the defect is so slight that no careful or prudent man would reasonably anticipate any danger, but still an accident happens which could have been guarded against by the use of extraordinary care" it then is a question of law (p. 485).

"If the existence of such a defect is to be deemed evidence of negligence on the part of the city, then there is scarcely any street in any city that is reasonably safe within the rule, and, when accidents occur, the municipality must be treated practically as an insurer against accidents in its streets" (p. 484-6).

Citing *Beltz vs. Yonkers*, 148 N. Y., 67.

Clapher vs. Waterford, 131 N. Y., 382: The failure of town commissioners to discover a hole four or five inches wide and ten or twelve inches long in a bridge over a gutter is not negligence (Syl. 3, p. 383).

(B.)

An additional reason why the presiding justice should have instructed the jury to return a verdict for the defendant was the fact that the plaintiff was an agent of the defendant and charged with the inspection of the very place where he was injured.

If there was any employee of the District of Columbia who should have known of the defect in these doors, that person was the plaintiff in this case. He was an inspector in the employ of the District and at the time of the accident was engaged in an inspection of this alley, to see that it was properly cleaned, the dirt properly piled and removed; and *this inspection included the doors in question.*

It is a matter of common knowledge that the District of Columbia has no force specifically designated to inspect its highways with a view of ascertaining and reporting their safety for travel, and never has had an appropriation from Congress for that purpose. The nearest approach to such a force is the street cleaning division of which the plaintiff was a member.

In *Cooper vs. Butler*, 103 Pa. St., 412, 415, an employee operating cars upon an inclined railway, whose duty it was from time to time to inspect and report upon the condition of the railway, was injured while operating the cars, the accident being caused by the defective condition of the track which he had negligently failed to observe and report, but which he could have ascertained by reasonable and careful inspection. *Held*, that he could not recover.

In *Wood vs. Waterville*, 4 Mass., 422, the horse of a surveyor fell through a defective bridge. It was one of the duties of the surveyor to inspect and repair bridges, among which was included the bridge in question. *Held*, that he could not recover.

II.

Under the operation of the ordinary rules of municipal law the plaintiff would have a right of action, in cases like the present, against the property owner and the municipality; and the municipality, in the event of its being sued alone and judgment recovered against it, would have a right to an action over against the property owner.

IV Dil. Mun. Corp. (5th Ed.), secs. 1720, 1725, 1726, 1728.

In the present case, however, the property belongs to a foreign government and is occupied by its accredited representative for legation purposes. The municipality cannot sue either the foreign government or its ambassador (2 Wharton, Inter. Law, sec. 93), and its right of action over is lost.

The manure pit in this case was built by the foreign government for its own use without a permit from the municipality (R., p. 8).

Query,—Whether there is any liability on the part of the municipality in this case?

Third Assignment of Error.

Upon this point the court charged the jury as follows:

“If you find that the duties that belonged to his office included the duty of inspecting this very door as a part of the surface of the street, and, if you find, that when he went there on that occasion the inspection that he intended to make would have included the actual inspection of this door by him, then under those circumstances the city would not be responsible to him for the injury he claims to have received in this case, because there you would have a case where the city says to a man: ‘I hire you to go up and look at this particular door and see if it is safe.’ Of course if a city hires a man to go and look at a door to see if it is safe, and he goes thither and jumps on it, without first finding out and it turns out to be unsafe, that is a chance that he takes in accepting that employment. But it is only under those conditions of that twofold aspect that the question of his employment is at all important.

“I repeat that unless you find that his employment included the duty of inspecting this door and further find that when he was engaged on this particular occasion he was engaged in an inspection which included the inspection of that door—unless you find both these considerations to exist, you need not consider the fact of his employment. But if you do find both of these considerations to be the fact—that is to say, if you find that his duty did include inspecting this door and you find that he was out that day on the inspection of this alley, which included the inspection of that door,—if those two facts existed, then he cannot recover at all in this case, no matter how defective the door was.”

This statement appears to involve two propositions. The first part of this charge told the jury that if the plaintiff was charged with the duty of inspecting the door as part of the street and that the inspection that he intended to make would have included this door, then the city was not responsible. This was in effect charging the jury that the city was not responsible, because this was the testimony of the plaintiff himself (R., p. 6), and instead of leaving it to the jury to determine as a matter of fact, the court should have instructed the jury as a matter of law that the city was not responsible. The court, however, did not stop at this point, but proceeded to illustrate with the further remark that this would make a case of where a man was hired to look at a particular door to see if it was safe and then if he went and jumped on it and it turned out to be unsafe that was his risk. The qualification should not have been given because it was not necessary. If the plaintiff was charged with the duty of inspecting this door to see if it was safe, defendants, of course, would not be liable; and the instruction in that aspect was too narrow. If the plaintiff was charged with any duty of inspection as to this door, and he was so charged, his attention was directed particularly to the door, and if there was a previous defect in it he should have discovered it; but the plaintiff testified not only that he did not know that the hinge of the door was broken, but further "*that there was nothing to indicate that they were*" (R., p. 6).

These two propositions are twice repeated in the charge (R., 13), *i. e.*, if that it was the duty of the plaintiff to inspect the door and if he was at the time of the accident engaged in an inspection that included this door. It is difficult to separate these two propositions, or to determine in what respects they differ. It was the undoubted duty of the plaintiff to inspect this cellar door as a part of the surface of the alley to see that it was swept clean and he was also undoubtedly engaged in an inspection that included that door; or, put as a single proposition, plaintiff at the time was engaged

in an inspection of the alley in which the doors were located and incidentally included the doors. But the proposition or propositions as submitted by the court included the further element of a duty of inspection as to safety, and this, it is submitted, was an unnecessary limitation upon the charge. And it is submitted that the charge upon this matter of the plaintiff's employment was confusing to the jury.

It is respectfully submitted that the court erred in not directing a verdict for the defendant and the cause should be remanded with directions to dismiss the suit.

EDWARD H. THOMAS,
FRANCIS H. STEPHENS,
Attorneys for Defendants.

